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Supreme Court of the United States.

OCTOBER TERM, 1902.

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WILLIAM E. HALE, AS RECEIVER FOR THE COLLECTION AND ENFORCEMENT OF THE LIABILITY OF STOCKHOLDERS OF THE NORTHWESTERN GUARANTY LOAN COMPANY (A CORPORATION), PETITIONER,

vs.

EDWARD P. ALLISON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY TO BRIEF SUBMITTED AMICUS CURIÆ.

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The brief, presented *amicus curiæ* in this case, has been subjected to so much refined and technical differentiation as to obscure the precise lines of argument intended to be urged.

We shall confine this reply to an attempt at summarizing the contentions and answering the same, so far as answers have not already been anticipated on our original brief.

The main contention is that the liability is unenforceable in any jurisdiction outside that of the corporate domicile.

An analysis of the argument presented in support of this claim discloses three principal reasons:

First. That the liability is not several and independent.

Second. That unless the State of domicile has abdicated its sovereignty (whatever this may mean as applied to liabilities of this class), either (1) by providing an independent and several remedy for creditors, or (2) by providing for substituted service of process upon non-residents so as to bind them by personal judgment, foreign enforcement is impossible.

Third. That the general principles of equity procedure, as well as the express provisions of the local law, contemplate a single omnibus proceeding in the courts of the domicile.

1. It is a noteworthy fact that the concession in favor of the rule of law permitting the enforcement of the several and independent liability is predicated on a reason never heretofore suggested, viz., on the ground of abdication of sovereignty by the State.

The rule as respects this class has been so far settled as to now be axiomatic in our jurisprudence, that the right of enforcement is based solely and exclusively upon principles of contract. The local law in these cases plays no further part than as determinative of the constituent elements of the contract.

It would hardly be contended at the present time that

the right of a receiver of a corporation suing in a foreign jurisdiction, after an assessment for unpaid capital in the courts of the domicile, was dependent upon abdication of sovereignty. Yet it would be precisely as logical to predicate the right to relief in the case supposed on this ground.

By a similar course of reasoning counsel would doubtless claim that the right of a receiver of a national bank, to enforce an assessment on the capital stock as against a stockholder, was referable to a similar abdication of sovereignty upon the part of the National Government.

The attempt to reconcile the established rules in this class of liabilities, with the reasoning advanced in the brief submitted, is forced and predicated on an entirely false hypothesis.

2. Reduced to its lowest terms and eliminating meaningless and unsubstantial reasons, the contention is that a liability imposed by the laws of the State of domicile upon stockholders equally for the benefit of all creditors in common is unenforceable except as against those stockholders subject to the jurisdiction of the domiciliary courts for the purpose of rendering personal judgment.

Thus it is said at page 43 :

"The Minnesota legislature ought undoubtedly to have made its statutory procedure complete and effectual by providing for substituted service on non-residents, and the result of its failure to do so may be that in cases like the present, no effective remedy can be had in any court."

If it has ever been held that such a law as that supposed could be passed and sustained upon constitutional grounds so as to bind a non-resident stockholder as by a personal

judgment, counsel has failed to enlighten us by the citation of precedent.

Eliminating this phase, we may examine the result of this contention. We have thus two classes of stock liabilities enforceable against foreign stockholders: (1) where the liability is several and independent, and (2) where it is common and equal, but the statutes provide for substituted service upon the non-resident, so as to render a personal judgment as a basis of the foreign suit.

This would exclude the enforcement of the stock liability under the national banking act by a receiver, after assessment by the Comptroller, and equally the liability imposed by those statutes which, according to local interpretation, is enforceable after assessment in the domiciliary court at the suit of the general corporate receiver.

See Howarth *vs.* Lombard, 175 Mass., 570.
Howarth *vs.* Ellwanger, 86 Fed., 54.
Sheafe *vs.* Larrimer, 79 Fed. Rep., 921.
Howarth *vs.* Angle, 162 N. Y., 179.

The liabilities thus referred to are obviously outside both classes suggested in the argument. In view of the established law, counsel must either amend his reasoning or add an additional class with some further novel grounds for its support.

3. Counsel further urges the insufficiency of the Minnesota statute. The argument merely reasserts the contention which has been urged all through this litigation that the Minnesota statute should be so construed as to bind the resident stockholder and relieve the non-resident from liability.

Two general reasons are presented:

First. That, according to equity procedure, an omnibus proceeding in the domiciliary court is required from practical considerations, which shall settle once and for all the rights and liabilities of all parties in interest.

Second. That the statute of Minnesota relating to the remedy carries out this equitable idea, and that the rights of creditors and liabilities of the stockholders are exhausted in this single proceeding.

As to the first, eliminating certain State precedents wherein the reasoning has been adduced to establish the non-enforcibility of the statutory liability and the rule and reasons in this regard have been indiscriminately applied to the several and independent, as well as what may be termed the equitable liability, we know of no precedent sustaining the proposition directly or by analogy. The frequent case of proceedings in equity for the sequestration of corporate assets, including unpaid capital, presents the most familiar illustration of the contrary principle. It has never been suggested that an omnibus proceeding bringing in all stockholders is essential. In fact, it is settled that it is not essential to bring stockholders in at all.

Hawkins *vs.* Glenn, 131 U. S., 329.

Those stockholders within the jurisdiction of the court may in such cases, at the option of the creditor, be brought into the original proceeding and the assessment enforced against them by an immediate decree, leaving the receiver therein appointed to resort to ancillary or auxiliary proceedings to enforce the liability as against those not brought in.

Vol. 3, Thompson on Corp., § 3492.

As reasons for the supposed equitable requirement of an omnibus proceeding we quote the following from pages 29 and 30 of the brief in question:

"There should be a single roster of adjudicated stockholders and a single table of the holdings of the several shares of stock. Otherwise (for example), in a case requiring only a partial assessment, one might in the end be assessed seventy per cent. of his maximum liability on the theory that the total stock issued was at one figure, and another only thirty per cent. on the theory that the total stock issued was at a much larger figure; or two different men might, in different tribunals or different suits, both be held as stockholders of certain disputed shares of stocks."

"There should be a single adjudication of the times of ownership of stock by the several stockholders, for otherwise two successive holders of certain shares might both be held, or the wrong one might be held or both might go free."

"The necessity that all questions of the personal liability of stockholders be adjudicated in the omnibus proceeding and be not left to subsequent distinct suits, appears from the fact that any present defense on the merits successfully maintained by one alleged stockholder, will increase the proportion in which all the others are liable."

Each of these supposed reasons might be urged as effectively in a case involving unpaid subscriptions as in the case at bar.

Everything thereby suggested may be disposed of by the general statement that they present questions of moot consideration so far as any issue involved in the present case is concerned, and that it will be time enough to meet and determine them when a case arises wherein they are pertinent.

There is here no question of partial or unequal assess-

ment; no dispute is presented as to conflicting ownership in stock; the time of holding presents an immaterial factor, as all of the stockholders now sued have admitted by their demurrers that they were such at the time of the insolvency of the corporation. As the assessment involved is for the maximum liability and the gross amount contemplated therefrom, if realized in full, would not equal one-half of the deficiency of assets, there is no question of increasing or diminishing the liability by the successful interposition of separate defenses.

The claim that there should be a single roster of adjudicated stockholders and a single table of the holding is clearly opposed to established rules in this class of cases. No such adjudication is required as a condition precedent to the right to sue. The latter is sufficiently predicated of the proceedings had and taken in the courts of the domicile in the adjustment of the affairs of the corporation, determining the necessity for and amount in which all stockholders in common must contribute.

Hawkins *vs.* Glenn, 131 U. S., 319.

See also cases cited *supra*.

Hanson *vs.* Davison, 76 N. W. Rep., 254 (73 Minn., 454).

The adjudication of holding or non-holding is the appropriate function of the court in which the personal rights of the stockholder are presented, in a case where jurisdiction of the stockholder for that purpose is had.

Hancock Nat'l Bank *vs.* Farnham, 176 U. S., 640.

Great Western Telegraph Co. *vs.* Purdy, 162 U. S., 329.

It is also suggested that "there should be a single determination of the dates of the incurring of the corporate liabilities."

This element is equally immaterial in the case at bar. Here upon the conceded facts all parties, creditor and stockholder, were respectively such at the date of the corporate insolvency. From this the liability follows as a matter of law.

> Gebhard *vs.* Eastman, 7 Minn., 40, 55, and cases cited, page 19, Petitioner's Brief.

The suggestions that the character of the indebtedness of the corporation, whether in contract or tort, and likewise "of the amount of capital stock paid up" should be similarly determined, are purely moot so far as the case at bar is concerned. The character of the indebtedness is here alleged and admitted; but if it were otherwise the question of *ultra vires* would be affirmative matter to be presented by way of defense.

The element of paid-up stock is in no event a factor. Unpaid capital is, for obvious reasons, an asset to be ascertained and accounted for with other assets of the corporation. In the case at bar, this is embraced in the finding of the decree that the total aggregate of corporate assets of every kind and character amounts to $440,000 (Rec., p. 85, par. fourth).

These supposed insurmountable objections to the foreign enforcement of liabilities of this class are neither new nor novel. In the progress and development of the law of foreign enforcement of liabilities to corporate creditors, it will be found that they have successively assailed: (1) The right to enforce unpaid subscriptions in foreign forums after

an assessment or call by the domiciliary court administering the corporate affairs; (2) the enforcement of the stock liability under the national banking act; (3) the foreign enforcement of the several and independent liability of stockholders; (4) the enforcement of the statutory liability where collectible at the suit of the general corporate receiver after assessment in the courts of the domicile.

Concluding, therefore, on this phase, the claim that the general principles of equity demand an omnibus proceeding, confined in its effect to parties directly joined therein, is unsustainable on any principle whatsoever. In the absence of statute specifically governing the matter, it is believed that wherever the liability is created for the benefit of creditors in common, the application of general principles of equity would, by analogy to ordinary rules of practice, permit the court of the domicile, having jurisdiction of the corporation, to ascertain in appropriate proceedings the relations between the creditor and corporation, the necessity and amount in which stockholders should be held to contribute, and that this adjudication would be final and conclusive on all stockholders and in every forum where suit might be brought.

The entire trend of authority is in this direction; and as the result thereby contemplated works in harmony with the general spirit and purpose of the law taken as a whole, i must and will become a settled principle in our jurisprudence.

"If an assessment is to be laid upon the members or stockholders, or contribution enforced from them according to the law of the State under which the corporation is created,

the courts of that State alone can afford complete and effectual relief."

Post *vs.* Railway Co., 144 Mass., 341.

"The proper courts of the State under whose laws the corporation is established have full jurisdiction over the corporation. Whether in such a suit such courts can acquire jurisdiction over all the stockholders, wherever they reside, in order to determine their liability under the statutes to which they may be held to have assented in becoming stockholders, it is unnecessary now to consider. The proceedings are somewhat analogous to the laying of an assessment ratably upon all the stockholders for the purpose of paying the debts of the corporation in the manner and to the extent prescribed by the statutes."

Hancock National Bank *vs.* Ellis, 51 N. E. Rep., 207, 211.

"The determination of the questions involved is a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local courts, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability, such decisions and orders are binding on stockholders who are not before the court otherwise than by their membership in the corporation."

Howarth *vs.* Lombard, 175 Mass., 570.

"The appellant must first seek a remedy in the courts of the State of Michigan, and there have authoritatively determined the respective relations of creditors and all stockholders of this corporation towards it and towards each other; and then, if it shall be necessary, their rights as respects stockholders, domiciled in this State, may be enforced in the courts of this State."

Young *vs.* Farwell, 139 Ill., 326.

"No decree of the courts of this State could result in taking an account and dissolving a corporation of another State. It is for the courts of that State to enter a decree stating the account, winding up the affairs of the corporation, and determining the relation of the stockholders, creditors, and corporation to each other. When that question has been determined by the courts of that State, then, if it becomes necessary, the creditors, stockholders, and the corporation, or its representative, may, as against stockholders who are domiciled here, appeal to the courts of this State, and have, as against such domiciled stockholders, adequate relief."

Tuttle *vs.* National Bank, 161 Ill., 497.

"We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, *and that this is involved in the contract created in becoming a stockholder.*"

Hawkins *vs.* Glenn, 131 U. S., 319.

"In principle, there can be no difference in this respect between an action to enforce an unpaid subscription, and one to enforce a stockholder's liability."

Hanson *vs.* Davidson, 76 N. W. Rep. (Minn.), 254.
Reaffirmed in Langworty *vs.* Garding, 74 Minn., 325.
Straw Mfg. Co. *vs.* Kilbourne, 80 Minn., 125–134.
See also Holland *vs.* Duluth, 65 Minn., 324.

These principles may be sufficiently predicated of the following rules of general application: (1) The fund contemplated from the liability is a trust fund for the benefit of creditors; (2) equity never allows a trust to fail for want of a trustee; (3) because it is necessary that such jurisdiction should be assumed to prevent a miscarriage of justice and insure to creditors the rights assured them by law in their dealings with the corporation.

They carry out the spirit of the general rule stated by the supreme courts, respectively, of Massachusetts and Maine in Bank *vs.* Ellis, 172 Mass., 47, and Childs *vs.* Cleves, 95 Me., 498, as follows:

"It certainly concerns the due administration of justice that all stockholders, wherever they reside, should be compelled by proceedings somewhere, to perform the statutory obligations towards creditors of the corporation which they have assumed by becoming stockholders."

Reaffirmed in Hale *vs.* Cushman, 51 N. E. Rep., 874.

This brings us to a consideration of the second general ground that the Minnesota statutes have so far limited the jurisdiction of the courts of that State, that the operative effect of their proceedings is limited to the resident stockholders, and in consequence non-residents are wholly relieved from responsibility.

In leading up to the argument of this question counsel states, at pages 34 and 35, the following propositions:

"Just as a State may, by statute, impose a personal liability upon stockholders for corporate debts, so a State may, by express enactment, require all persons who become members of certain corporation, or class of corporations, to surrender their right in respect to the particular statutory liability in

question *to the protection of the equitable principles under discussion.*"

"Where the home State has not determined those questions by express statute, the general principles of equity above stated, have full force. When it has so determined them, its determination is binding everywhere."

"The equitable principles under discussion" presuppose an omnibus proceeding to which the non-resident cannot be made a party.

Literally construed, the first of these propositions would indicate, as counsel's view, that the power and authority of the State was limited to requiring non-resident stockholders to submit to conditions which are wholly inoperative and of no force or effect.

Eliminating the reasons assigned therefor, in the propositions excerpted above, an otherwise correct statement of a general rule has been destroyed by interpolating counsel's erroneous views of the principles of equitable procedure.

Amended in this respect, we cordially indorse their correctness. Thus amended, the general statement would be that, in the absence of statute, the State may and impliedly does require all stockholders to submit their right, in respect to the class of statutory liabilities in question, *to the regular and ordinary jurisdiction of chancery exercised in the administration of corporate affairs.* In the presence of a statute limiting or qualifying such jurisdiction, the statute is controlling.

To this we should add a third suggestion, viz., where the statute is clearly declaratory of the ordinary procedure in chancery, it should be interpreted accordingly and the ordi-

nary power and jurisdiction of chancery assumed to exist, unless negatived by the express terms of the statute itself.

The case in this aspect turns upon a determination of the question whether the Minnesota statutes have thus annulled the ordinary chancery jurisdiction.

The general purpose and nature of the proceedings contemplated by these statutes may be explained in the language of the supreme court of that State, found in Arthur *vs.* Willius, 44 Minn., 409, 412:

"An action against a corporation, under Gen. St. 1878, c. 76, is in the nature of an action to wind up its affairs, to collect and convert all its assets, and appropriate them ratably among creditors, and to enforce the individual liability of stockholders and others to the extent of the deficiency of assets. As was said in Merchants' Nat. Bank *vs.* Bailey Mfg. Co., 34 Minn., 323 (25 N. W. Rep., 639), 'It is an action not proceeding in the ordinary way of actions at law by trial of simple issues, judgment, and execution, but by the exercise of powers peculiar to the former courts of chancery.' The proceedings are susceptible of being moulded into almost any form necessary to accomplish their purpose of securing a full and final adjustment of the rights and liabilities of all parties growing out of the corporate business. During the progress of the proceedings new parties may be admitted or brought in, and new issues introduced from time to time, as they become necessary for the final winding up of the affairs of the corporation, and the enforcement of all the rights of creditors. The original complaint need not state more than a case for the sequestration of the corporate assets. Neither stockholders, directors, nor creditors, (save the one who institutes the suit,) need be made parties in the first instance. Other creditors may subsequently come in or be brought in. Stockholders and directors may also be brought in for the purpose of enforcing their individual liability. This may

be done at the instance or upon the complaint of any creditor who has become a party to the proceedings. In short, the proceedings are intended to be so elastic as to be susceptible of development during their successive stages of progress, as to reach not only all the corporate assets, but also all liabilities of stockholders and others so far as necessary for the payment of creditors."

The language quoted is in strict conformity with the uniform holding of the courts of that State in decisions both earlier and later than that cited.

It would be difficult to conceive of a broader or more comprehensive interpretation of the act, as indicative of an intention upon the part of the legislature, to invest the court of the domicile with the fullest chancery jurisdiction as respects sequestering *every form of liability available for creditors of an insolvent corporation.*

The general jurisdiction thus established, clearly embracing the power in question, is, however, claimed to be qualified by certain provisions as respects procedure. Hereunder it is asserted that the act contemplates a single proceeding to which stockholders must be made parties, and that the jurisdiction of the court is accordingly limited to the parties before it.

When we come to consider formal methods of procedure and to analyze the act in question in this regard, it has been held in many instances by the same court that its provisions in formal matters are meagre and its general purposes to be effectuated by the application of ordinary rules of equitable procedure. Thus, as said in State *vs.* Bank, 56 N. W. Rep., 575, referring to this act:

"Chapter 76 provides but a mere skeleton of procedure for the action authorized by it. Its provisions are very meagre. * * * The action is given for a remedy to which the creditor is entitled as a matter of right, and which does not rest in the discretion of the court. It is the duty of the court to make the action effectual and to exercise for that purpose the powers vested in it."

Similarly, in Hanson *vs.* Davidson, 76 N. W. Rep., 254, the same court say:

"The remedy for enforcing the liability must, in the first instance, from the nature of the liability, be an equitable action. Gen. Stat. 1878, chapter 76 (Gen. Stat. 1894, chap. 76) indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure."

It remains to be ascertained what the ordinary methods of procedure adopted under that act contemplate. Primarily the proceeding is brought against the corporation in the nature of a creditor's bill for the purpose of sequestering its properties and the appointment of a receiver. To this proceeding may be added, either on the complaint of the original or an intervening creditor, a cause of action against stockholders for unpaid capital, *and for this purpose such stockholders are made parties defendant by amendment or otherwise.* This may again be enlarged in a similar manner for the purpose of enforcing the statutory stock liability where the corporation belongs to a class to which that liability extends.

This was the precise aspect of the case of Arthur *vs.* Willius, *supra*, wherein the original creditor filed his bill against the corporation and the stockholders, seeking from the latter

a recovery of unpaid capital, and an intervening creditor filed his complaint, realleging the same matter, and in addition the statutory liability of the stockholder defendants.

The purpose of this procedure is manifestly to bring as far as possible into a single proceeding and encompass in a single decree, without the necessity of resorting to auxiliary proceedings, the entire subject-matter.

This main purpose of avoiding circuity of action and multiplicity of suits runs throughout the entire line of decisions interpreting the procedure under the act in question.

As said by the supreme court of Minnesota in McKusick *vs.* Seymour-Sabin Co., 48 Minn., 158:

"It is entirely consistent with the established equity jurisdiction, and in accordance with established equity practice, to forestall a multiplicity of actions by bringing all the litigation into its grasp in one suit for a general accounting and complete adjustment of all rights."

Because stockholders are thus brought in, it is strenuously urged that the jurisdiction of the court and the rights of the creditors are exhausted in this proceeding. If this be true, *it must apply as well to a case involving unpaid capital as to one involving the statutory liability, for so far as the statute in question is concerned, or the procedure adopted pursuant thereto, no distinction between the two classes exists.* This will appear more clearly from an examination of sections 5909 and 5910, which are claimed to conclusively demonstrate that the jurisdiction of the court is limited by the rendition of judgments against the parties joined in the principal proceeding. These sections read as follows:

"SECTION 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made

parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares held by him, or so much thereof as is necessary to satisfy the debts of the company."

"SECTION 5910. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases."

It is self-evident, however, that no such conclusion as that contended for would be sustainable for a moment if this case involved an assessment for unpaid capital had in the proceeding above indicated, and this, notwithstanding, in conformity to the rules of procedure adopted in that State, the local stockholders were brought in and made parties defendant.

Where the general proceeding thus referred to is excluded by an administration of the corporate properties, inaugurated under the insolvent laws of the State, the statutes in question as far as applicable are adopted in the separate proceeding for the administration and enforcement of the statutory liability.

This, however, in nowise modifies the general purposes of the law. The administration in the affiliated insolvency proceeding, pending in the same court, is substitued in part for the entire proceeding provided by the statutes in question.

International Trust Co. *vs.* Am. L. & T. Co., 65 N. W. Rep., page 78.

For the remainder, the situation and jurisdiction of the court remains the same.

This separate proceeding has been developed along the same lines adopted in cases where it was had as part of the entire proceeding contemplated by the act, viz., bringing in the stockholders within the reach of process, and thus avoiding the circuity of action incident to separate suits at law after an assessment.

Having regard to the general purpose contemplated in the act, this method of procedure does not and should not be held to deprive the court of one of the most essential elements of jurisdiction incident to its control over the corporation itself. No other effect should be accorded than in the similar case where the stockholders are brought in and the subject-matter involved unpaid capital.

If the contention asserted and relied on in the case at bar be sustained, it is self-evident that the purpose and scheme of the act, with the jurisdiction thereby contemplated, for rendering every fund available, has been largely defeated.

The conclusion contended for in this regard results in relieving stockholders, whether resident or non-resident, omitted from the principal proceeding, from liability, a conclusion in this regard not only not sustained by, but expressly negatived by the holdings of the supreme court of that State.

As said by that court in Harper *vs.* Carroll, 69 N. W. Rep., 619:

"The stockholders' liability is several, not joint; and a judgment against only a part of the stockholders within the jurisdiction does not have the effect of releasing the others."

Similarly, in Hanson *vs.* Davidson, *supra*, that court, after reaffirming the rules stated in the quotation last above, said as follows:

"There is nothing in the statute which justifies the conclusion that if a stockholder's liability is not enforced in the original action because he is a non-resident, an ancillary action may not be brought against him alone, after the amount for which stockholders are individually liable has been determined in the original action" (p. 461).

Again:

"Neither is there anything in the nature of the stockholder's individual liability or method of enforcing it, to prevent the enforcement of the liability against a stockholder so omitted from the original action. The constitution or the statute imposes the liability on all corporations, except those organized for carrying on any kind of manufacturing or mechanical business; and it follows *that every person* who becomes a stockholder in a corporation organized under our laws, contracts, with reference thereto and with the creditors of the corporation, that he will be liable for its debts, to the limit fixed by our constitution and statute."

The conclusion contended for by counsel is therefore not alone opposed to the principles established in analogous cases, but equally to the construction and interpretation of the local law, to which the question is primarily referable, by the courts of the domicile.

The anomaly of the result contended for as respects non-resident or foreign stockholders may be illustrated by an hypothetical case instituted under the act in question.

Suppose that in the case of Arthur *vs.* Willius, explained *supra*, foreign stockholders had existed, indebted to the cor-

poration for unpaid capital and also to the creditors for the statutory liability. Suppose further in that case the court of the domicile in the original proceeding had, after an accounting of the debts and assets, entered a decree determining that the entire unpaid capital should be called in, making an assessment or call therefor accordingly, and also that the maximum statutory liability should be collected from all stockholders in common.

It is clear that the resultant action of the court in determining the necessity for collecting the unpaid capital, as well as the statutory liability, proceed from the same state of facts, viz., an ascertainment of the debts and assets, or, as it is familiarly termed, an accounting. Under well-established rules it would, in the case supposed, be held that the foreign stockholder was present, represented by the corporation, for the purpose of these ascertainments, so far as the unpaid capital was concerned. Notwithstanding, applying the contention of counsel in the case at bar, the same adjudication, predicated of the exercise of the same functions and based upon precisely the same facts, would be treated as a nullity and of no effect in the matter of enforcing the statutory liability.

The attempt to thus arbitrarily divide the proceeding involving the exercise of identical judicial functions, referable to and governed by the same statute, can find no logical reason or justification.

Briefly digressing, it has in some cases been asserted in reference to the class of liabilities which may be termed equitable that one of the essential requirements or reasons for an omnibus proceeding was the protection of the stockholders and the adjustment of the equities between them.

From this it has been concluded that the right of the creditor is to be subordinated, and by application of the rule the contractual liability has been repudiated.

It would serve no useful purpose to extend this brief to the presentation of the variety of arguments that have been made in this respect. All obviously have one thing in common, viz., finding a means to facilitate a repudiation of the obligation. It goes without saying that the supposed equity of the stockholder is a matter exclusively for his benefit to be adopted and applied under circumstances where the application of the rule does not interfere with the paramount right of the creditor.

As said by the supreme court of Minnesota, in Hanson *vs.* Davidson, *supra:*

"It would seem that his (the stockholder's) right to contribution, in case he was required to pay more than his share as between himself and the other stockholders, is subordinate to the equities of the creditors, as he can secure such contribution by appearing in the original action."

The question of contribution is, however, not involved in the case at bar, where the maximum liability has been determined, and where, therefore, no claim for contibution can in any event arise.

Before leaving this phase of the effect to be accorded the proceeding in the courts of the domicile, we desire to again call attention to the class of liabilities involved in Howarth *vs.* Lombard, 175 Mass., 570; Howarth *vs.* Angle, 162 N. Y., 179; Howarth *vs.* Ellwanger, 86 Fed. Rep., 54; Shcafe *vs.* Larrimer, 79 Fed. Rep., 921.

These cases involved the foreign enforcement of a statu-

tory liability created by the laws of the State of Washington. The statute is extremely meagre, but, as interpreted by the courts of that State, the liability is an asset as to creditors and enforceable at the suit of the general corporate receiver as the common representative.

Wilson *vs.* Book, 43 Pac. Rep., 939.

In conformity with this construction, it is held that it may be enforced in the general winding-up proceedings, and for that purpose the court of the domicile, on application of the receiver, may make an assessment or call therefor.

It has been universally held that this assessment is binding on all stockholders, and that the rule of jurisdiction through representation by the corporation applies. In the case at bar, as heretofore sufficiently shown, it is held that the liability is not enforceable by the general receiver or in connection with the administration of the general estate.

In principle, however, no substantial difference can be claimed between these cases. Nor should it make any difference in principle, so far as the jurisdiction of the court or the finality of its action is concerned, that in one case the assessment is made in an action to which the corporation alone is party defendant, or, as in this case, where, for the purpose of preventing multiplicity of suits, the corporation and stockholders within the jurisdiction are joined. In both cases the general purpose is identical, to wit, the ascertainment of the facts upon which to predicate a call or assessment as against the stockholders. The general power of the court in both cases results from its jurisdiction over the corporation for the purpose of winding up its affairs and rendering every asset available for creditors. It is immate-

rial whether this object be accomplished in a single or several affiliated proceedings. The purposes and functions of the court are identical and the differences in the matter of procedure unsubstantial.

Finally, upon the phase of the proper interpretation of the Minnesota statute, it is urged by counsel at page 44 of his brief that the conclusions contended for are corroborated by the fact that subsequent to the decree of the Minnesota court in the case at bar the legislature of that State amended the pre-existing remedial statute "providing for the collection of the superadded liability of non-resident stockholders in a manner similar to that attempted in the present suit, thus showing that in the opinion of the Minnesota legislature there was up to that time no such statutory provison."

This assertion is neither correct as matter of fact or law. It is unnecessary to enter upon any detailed discussion of the provisions of the statute referred to, as the same in express terms excludes from its operation cases in the situation of that at bar.

By chapter 272, Gen. Stat. Minnesota 1899, the previous law relating to the enforcement and collection of the statutory liability was modified so as to provide for the enforcement thereof in the general insolvency proceeding and by the general corporate receiver along lines similar to the procedure under the Washington statute referred to above and to the recent law adopted by the State of Kansas, presently before this court for review, in the case of Evans *vs.* Nellis, under questions certified from the circuit court of appeals of the second circuit.

It would be precisely as logical to contend that the modi-

fication of the Kansas law by the legislature of that State was a recognition or concession that the several and independent liability of stockholders theretofore provided was a nullity as far as foreign enforcement is concerned.

The foregoing review covers the several grounds of argument aimed at demonstrating that the statutory contract in the case at bar is unenforceable outside the State of Minnesota and that the laws of that State should be so construed as to impose the entire liability upon domestic stockholders and relieve the non-residents from participation in the responsibility.

II.

OBJECTIONS URGED IN MATTERS OF FORM.

The brief in question suggests certain defects in matters of form which only require cursory answer.

Like many of the objections urged on the principal question, the latter present considerations of either superficial or purely moot character.

Conceding, for purposes of argument, that the theory of the present suit is properly conceived and the construction of the law contended for by petitioner is correct, counsel claims that the decree of the Minnesota court is insufficient, for the reason that it has failed to embrace *all* "the material matters relating to the assets and indebtedness of the corporation."

The following defects are specified: (1) Failure to find the dates of incurring the various debts; (2) the character of such debts; (3) the amount of unpaid subscriptions; (4) whether any of the indebtedness was contracted in excess of the debt limit, and therefore *ultra vires*.

The first, for reasons heretofore shown, is wholly immaterial. In cases where separate classes of stockholders are liable for particular classes of indebtedness such finding may be pertinent. No such facts exist in the case at bar. Here all stockholders were such at the date of the corporation's insolvency and all creditors held their claims at that time. The latter were ascertained and embodied in the judgments rendered.

All stockholders in a corporation at the date of its adjudication in insolvency are liable to all the several creditors existing at that time, as heretofore shown.

Gebhard *vs.* Eastman, 7 Minn., 40–44.
Olson *vs.* Cook, 57 Minn., 522.
Bank *vs.* Plow Co., 58 Minn., 167.

The character of the indebtedness and the suggested possibility of *ultra vires*, if pertinent for any purpose, are sufficiently disposed of in the case at bar by the facts alleged in the bill and admitted by the demurrers. These matters are alleged in paragraphs numbered four, six, eight, and twelve of the bill (Rec., pp. 8, 9, 12) to the effect that the indebtedness of the incorporation, lawfully contracted in the regular course of business, aggregated at the date of insolvency upwards of three million dollars; that the bill for enforcing said indebtedness was filed in the district court of Hennepin county, Minnesota, and resulted in a decree in favor of the creditors and against the corporation, establishing the same and determining the necessity for contribution by stockholders to the payment thereof; that the entire indebtedness of said corporation was held by the said several creditors to the suit aforesaid, by reason whereof and the facts stated all

the several stockholders are liable to contribute to the payment thereof.

In this condition of the record it is not essential to determine whether the supposed defense of *ultra vires* is available after the judgment of the Minnesota court or not. The primary object of the proceeding in the domiciliary court was to ascertain the claims of creditors entitled to participate in a recovery. The presumption should obtain in any event that the adjudication in this respect was correct and that the claims allowed were of the required character, at least until an affirmative defense properly invoking the questions referred to has been interposed.

The subject of unpaid subscriptions was considered above.

It is further said relative to the binding effect of the Minnesota decree that the functions of the domiciliary court are exhausted by matters which (1) directly affect the corporation, and (2) those which operate to extinguish the value of the non-resident stockholders' stock.

In this respect counsel says:

"It is a fundamental principle that where a given tribunal or a given jurisdiction has no power to make an affirmative personal judgment against a given person, it has not power affirmatively to adjudicate, as against him personally, any one essential feature of such liability."

In the abstract, and as affecting strictly individual rights, the principle stated is not disputed. Its error consists in the attempted extension to corporate administrations wherein the rule of jurisdiction by representation is now too thoroughly settled to be subject to doubt.

That in the latter cases the foreign tribunal has power to adjudicate certain essential features of the individual lia-

bility was settled by this court in Hancock National Bank *vs.* Farnham, wherein it was held that not only did the power denied exist, but that the refusal to recognize this power and to accord the judgment effect, when asserted in a foreign tribunal, was a denial of due faith and credit within the constitutional inhibition.

It is next urged that the decree of the Minnesota court is not final, and that therefore the present proceeding is to be interpreted and considered as ancillary to a pending and undetermined cause in the courts of the State of Minnesota.

From this it is claimed that no such ancillary jurisdiction exists outside of the courts of the State in which the original proceeding is pending, and that the present bill must for this reason fail.

If this point presents anything of practical signification, the reasons adduced in its support have failed to impress themselves.

The object of the primary proceeding in Minnesota, as already sufficiently shown, was to render an account stating a decree of the debts and assets of the corporation determining the deficiency and apportioning the same against all stockholders in common.

This has been done, and the results thereof embodied in the decree of the local court establishing and rendering judgments for the amount of the indebtedness involved. In the same decree the assets of the corporation have been ascertained and the consequent necessity for contribution by stockholders. In the respects indicated, and so far as stockholders are concerned, even under the most technical forms of appellate procedure, such elements would constitute finality in the decree determining these substantial rights.

The suggestion that "fresh assets" might be discovered requiring a modification of this decree is so far problematical and remote as to require no serious consideration. As a matter of fact, it would require one million six hundred thousand dollars in value of "fresh assets" to modify the resulting conclusions here as respects the stockholders' liability and the necessity for its enforcement in the maximum amount.

We may, perhaps, in this connection be pardoned for suggesting that the element of "fresh assets" has played a part in the present proceedings in an inverse ratio to the discovery of "fresh technical points," opposed to the enforcement of the rights of creditors.

It is perfectly obvious that if the rights of creditors were to be postponed upon such remote and problematical considerations as those suggested their protection and enforcement would be rendered impossible.

It is sufficient to say that a court of equity invested with jurisdiction for administration in such cases has ample power to meet and deal with such contingencies, if they arise, and to protect the rights and interests of all parties involved.

It is further urged against the finality of this decree that the local court has retained jurisdiction for the purpose of finally adjusting the rights of the several parties. The necessity of this reservation, having regard to the character of the proceeding, is too obvious to require comment. The ultimate object is the administration and distribution of a fund to be derived from the enforcement of the decree, against many and diverse parties and in varied jurisdictions. The creditor interests have become parties to this composite proceeding, and it is essential for their protection and for

conserving the fund to be administered that the court should thus reserve jurisdiction in the premises.

It would be precisely as logical for a Minnesota stockholder, against whom personal recovery is adjudged by the decree, to deny its finality by reason of this reservation as it is for the non-resident to urge this ground.

As to the domestic stockholder, the decree is final, ascertaining his liability and rendering judgment accordingly. As to the foreign stockholder, the decree has finally ascertained the essential conditions to which his liability is referable. To the extent indicated, it is final as to both accordingly.

This disposes of the assertion that the proceeding is strictly ancillary, and therefore maintainable only in the Minnesota courts. The proceeding at bar is ancillary in the same sense that a suit by a receiver of a corporation, after assessment for unpaid capital by the courts of domicile, to recover from a foreign stockholder is ancillary to the main administration proceeding in which the assessment is made.

The principal administration is had to render available and distribute a fund to be collected from many and diverse jurisdictions. Every proceeding in furtherance of this object is in a sense ancillary, and it is immaterial in this regard whether the term be used in its strict or more general signification.

III.

RIGHT OF PETITIONER TO SUE AS RECEIVER.

This subject has been so fully discussed in our principal and supplemental brief in reply herein as to require the addition of little to what is there stated.

The question in this regard arises on the following sections of the Minnesota statute:

"SECTION 5906. The court shall proceed thereon as in other cases, and, when necessary, shall cause an account to be taken of the *property* and the *debts* due to and *from* such corporation, and *shall* appoint one or more receivers."

"SECTION 5907. *If* on the coming in of the answer or upon the taking of an account, it appears that such corporation is insolvent and that it has *no property* or effects to satisfy such creditors, the court *may* proceed without appointing any receiver to ascertain the respective liabilities of such directors and stockholders and enforce the same by its judgment as in other cases."

In the case at bar the record shows that the court did proceed to take an account of the property and debts due to and from the corporation—that is, in order to ascertain to what extent the stockholders should be held liable it was necessary to ascertain what property the corporation had—which property would include debts due to the corporation—and its value. This ascertainment resulted in a finding by the court that the value of this property was four hundred and forty thousand dollars, which was applied by the court towards the payment of the claims of the creditors which had been established, amounting to upwards of three million

dollars. Under this state of facts it became imperative upon the court to appoint a receiver in these proceedings to enforce the stockholders' liability, the language of the statute being, "and *shall* appoint one or more receivers."

The next section which we have quoted leaves it discretionary with the court whether or not a receiver shall be appointed in case the corporation is insolvent and has no property or effects to satisfy the creditors. So that conceding, for the purpose of the argument, that the facts in this case bring it within this section—that is, that it appeared (1) that the corporation was insolvent either upon the coming in of the answer or upon the account taken, and (2) that it had no property or effects to satisfy the creditors' claims—that is, that whatever property or effects it had was in the hands of the receiver of the corporation, to be disposed of by such receiver and not by the receiver in present proceedings, it was, nevertheless, discretionary with the court to appoint a receiver, and the court having exercised that discretion, the right to appoint a receiver under this section cannot be questioned. It will be noticed that the language in both of these sections with reference to the appointment of a receiver is very broad and does not limit the power of the court in designating the receiver's authority and duties, but leaves it very largely in the discretion of the court in appointing such receiver to clothe him with such power and authority as in the judgment of the court will best work out for the interests of the creditors, at the same time carrying out the general object and purpose of the action to enforce the stockholders' liability.

The supreme court of Minnesota recognized the right of the court to appoint a receiver under these sections (Harper

vs. Carroll, 66 Minn., 487) in a case like the one at bar, where the corporation was insolvent, had made an assignment, and its assets were being administered by the general receiver in the insolvency proceedings, when it said, "*The statute provides for the appointment of a receiver and this implies that his expenses may be recovered,*" etc.

IV.

Miscellaneous—Conclusion.

It is contended that the case of Harper *vs.* Carroll, *supra*, indicates the complicated character of the proceeding provided by the Minnesota law and the impossibility of effectuating its purposes in foreign jurisdictions.

Many of the purely technical suggestions of counsel here were evidently drawn from facts suggested by that case.

The liability and technical considerations thereto incident in that case arose under the peculiar statute of Minnesota relating to banking institutions, and is therefore wholly immaterial in the case at bar.

The remedial statutes in both cases were the same, and, in so far as that case settled general principals in this regard, it is pertinent and has been cited here.

The liability there was predicated on a statute continuing it for one year after transfer of the stock in favor of all existing creditors. As a result, the creditors and stockholders were perforce classified.

Here no such state of facts exists. The law extends the liability to all stockholders at the time of insolvency in favor of all creditors existing at that tine. For this reason no complication or classification is involved. The decree is for

the maximum liability. Its enforcement in full will not liquidate one-half the deficiency of assets.

The case is thus reduced to the simplest compass.

The remaining suggestions included in the brief under miscellaneous either present in different form substantially the same matters as those already considered or subjects of no practical significance, requiring no reply.

Respectfully submitted.

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